

FILED

12 O'Clock

JUN - 8 2009

JEANNE HICKS, Clerk
BY MARY DYAN
Deputy

IN AND FOR THE COUNTY OF YAVAPAI

Defendant.)

No. CR 2008-1339

PRESCOTT, ARIZONA
MAY 12, 2009
3:29 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

1 THE COURT: This is State of Arizona versus
2 Steven Carroll Democker, CR 2008-1339. Mr. Democker is
3 present. Mr. Hammond, Mr. Sears, and Miss Chapman,
4 Mr. Ainley, Mr. Butner, are all here for the respective
5 parties. Mr. Ainley and Mr. Butner, of course, for the
6 County attorney's office.

7 The meeting here is for purposes of us
8 scheduling and determining, among other things, what needs
9 you have, what settlement opportunities might be considered
10 in the case, schedule for witnesses to get interviewed and
11 other discovery to get completed, need for additional
12 assistance from the Court with regard to any particular
13 investigative or mitigation needs. So I am open to hearing
14 from both sides what your thoughts are in terms of length of
15 trial, proposed trial dates, other cutoffs, and things like
16 that.

17 Have you had an opportunity to discuss
18 those things with each other, Mr. Hammond?

19 MR. HAMMOND: Good afternoon, your Honor. I
20 think I will start out, at least on our side, summarizing
21 where we are.

22 We have conferred on the defense side.
23 We have not had an opportunity to confer with Mr. Ainley or
24 the County attorney's office. But we do have several
25 suggestions that we hope would help advance the case, and our

1 hope is that these might be matters that would be agreed upon
2 by the parties, but I am always happy to let the prosecutor
3 go first when we are talking about things like setting
4 schedules.

5 THE COURT: Do you have any preferences,
6 there, Mr. Ainley?

7 MR. AINLEY: I don't, Judge. We have
8 literally hundreds -- well, we could have as many as hundreds
9 of interviews to do.

10 And I talked to Detective Page earlier
11 today. He is in the process of making forensic copies of all
12 of the media items that were seized by law enforcement,
13 images of all the computers, things along that line, disks --
14 we were talking specifically about 66 disks. Some have
15 financial information on them. They're just a variety of
16 information, and the process, and we are hoping to have that
17 done by end of next week, but it is just an incredible amount
18 of material to go through.

19 Another issue that I had raised with
20 Mr. Sears' office was on one of the camera data chips that
21 was located, we found something that is technically, at
22 least, child pornography. It is not something that is
23 chargeable, Judge. It is something else that involves two of
24 the witnesses in this particular case. But we can't make a
25 copy of it and send it to Mr. Sears' office without getting

1 the kiddy-porn orders from the Court concerning dealing with
2 the photographs.

3 THE COURT: I think I understand what you are
4 saying.

5 MR. AINLEY: Yeah. So we are going to have to
6 do that, as well, where we can duplicate that information.

7 THE COURT: It has been in the news rather
8 recently about "sexting," and I presume that is the sort of
9 thing you may be referring to.

10 MR. AINLEY: Something like that.

11 THE COURT: All right. I am reading between
12 some lines there.

13 Please feel comfortable. Stay seated, if
14 you wish. If you are more comfortable standing -- I
15 recognize some people are because of back problems and such,
16 but please feel free to remain seated, if you wish,
17 gentlemen.

18 Mr. Hammond?

19 MR. HAMMOND: Thank you, your Honor.

20 Just so we are clear about this, the
21 matter that Mr. Ainley just raised does not involve our
22 client in any way but involves people who may be witnesses,
23 and I assume that was clear to you.

24 THE COURT: That was clear to me. The trouble
25 is that this is a case involving media, and I recognize that

1 sometimes screaming headlines can misinterpret what is being
2 stated. So I think I understood what Mr. Ainley was saying.
3 I appreciate your clarification so that this doesn't become
4 worse than -- in terms of response by people who are not
5 seeing what he is saying.

6 MR. AINLEY: Let me make the record, Judge.
7 This does not involve Mr. Democker in any way, shape, or
8 form, but it involves a minor who is involved in this case as
9 a witness and another possible witness.

10 THE COURT: Okay. I think I am as clear as
11 can be on that.

12 MR. HAMMOND: Your Honor, in terms of the -- I
13 think Mr. Ainley is right to address, at least first, the
14 question of document production and discovery. That's
15 certainly the first thing on our minds today, along with a
16 couple of other things. And I think Mr. Ainley's summary is
17 certainly correct as far as it goes.

18 But just to give you a little bit more of
19 the background of where we stand -- I think we have counted
20 correctly. To date we have had produced about 5,000 pages of
21 documents and --

22 THE COURT: 5,000, all Bates-stamped, I
23 assume?

24 MR. HAMMOND: Yes. I believe they are all
25 stamped.

1 And the most recent group of paper
2 documents were produced as recently as last Friday, another
3 600 pages. So that process is certainly ongoing.

4 We do have -- I think now it would be
5 accurate to say more than a hundred CDs, and 20 of those that
6 we just received. I don't know whether the 66 that
7 Mr. Ainley is --

8 MR. AINLEY: That is in addition.

9 MR. HAMMOND: So that would make it almost
10 beyond my arithmetic imagination, but that would put it over
11 180 CDs. So we know that there has been a lot produced, but
12 there is more yet to be produced. And we are concerned about
13 it both in terms of the volume that has to be digested, but
14 we are also, obviously, concerned about a couple of
15 overriding things.

16 One, we have a gentleman here who is
17 incarcerated who, as things stand now, doesn't reasonably
18 foresee that he won't be, and we also are mindful of the
19 importance of getting dates on your calendar that are both
20 realistic, but we hope reasonably hard so that we all can do
21 some planning.

22 So putting off -- I think I suggested
23 last week -- putting off making some date decisions is not
24 something that we favor. We would like to go ahead and start
25 locking in some dates both for the completion of discovery

1 and motions, and hopefully at least something we can begin to
2 rely on in terms of a prospective date to take this case to
3 trial.

4 The thought that we have had, turning
5 first to the question of discovery -- and understanding,
6 Judge, that the case has been pending, now, for eight months.
7 The homicide occurred, I think, more than ten months ago
8 now. While we appreciate that a lot has been done, we
9 believe that there ought to be an end point established for
10 the completion of Rule 15 discovery. We have looked at the
11 whole chain of events that need to happen in this case and in
12 any capital case, and obviously, before we do all the
13 interviews, this phase needs to be done.

14 So what we would like to propose is that
15 there be an end point on the State's disclosures. We would
16 like to have it -- I think we are well past what those dates
17 ought to be, in any typical case, but if we could agree on
18 something like 30 days from now to conclude all of the
19 discovery, possibly with the exception of the aggravation and
20 mitigation-related discovery that the State is obliged to
21 give us. The rules say that that discovery should occur
22 essentially 90 days after arraignment, 60 days for the
23 notice, and 30 days beyond that. We are well past that.

24 But it occurred to us that if we could
25 agree on a date of 30 days from now, either for all State

1 disclosures or 30 days for all substantive case disclosures
2 and another 15 or 30 for the aggravation/mitigation
3 disclosures, that would at least give us a fixed date. And
4 under the rules, our case-related disclosures would follow
5 those dates, 30 days for the underlying case-related
6 discovery and 180 for the responding mitigation information.
7 Dates like those would wind up putting us at the end of this
8 year by the time that we are completed with discovery. We
9 can certainly begin on the interview phase long before the
10 end of this year, and we would want to do that.

11 THE COURT: I should hope.

12 MR. HAMMOND: Long, long before the end of
13 this year.

14 But we would like, then -- if a program
15 of that type makes sense to the Court -- we'd then like also
16 to set a series of dates for the filing of motions in the
17 case. In other capital cases, that -- actually, a couple of
18 them, Mr. Sears and I have done together and others -- we
19 have broken down the motion part of the case into several
20 categories of motions.

21 We could establish a first date for all
22 discovery-related motions that would be filed, obviously,
23 some reasonable time after we've completed the State's
24 discovery and our case -- what I call case-related discovery,
25 sometime here early in the Fall, and then some other date for

1 the substantive motions, and a third date for all
2 death-penalty-related motions. It would give us an
3 opportunity to stage those things at times that would be
4 amenable on the Court's calendar and give us time to prepare
5 those as we go along. And we could talk about those dates
6 today, or we could submit something to the Court in writing
7 after today, as the Court wishes.

8 But the end point of all that, your
9 Honor, is that we would then like to talk about a trial date
10 at some time that I hope we could, as I said earlier,
11 reasonably lock in that might be in the range of a year or
12 maybe a little less than a year from now.

13 THE COURT: Either side have some idea of a
14 number of trial days that we are currently looking at?

15 MR. AINLEY: No, your Honor.

16 THE COURT: Granting, of course, not all of
17 the discovery is done as of this point, but any fair estimate
18 of what we are looking at?

19 MR. HAMMOND: We've talked about that.

20 THE COURT: Just for the substantive part of
21 it.

22 MR. HAMMOND: I think it is probably a guess,
23 but I will share our guess with you. I think our guess is
24 that a two-month trial -- we would be lucky if we were able
25 to organize this in a way to have it be a two-month trial.

1 And that -- by the way, I've learned in the last couple of
2 days that the Court's weekly calendar is such that the Court
3 typically is only able to devote three days a week to trial.
4 So I think those two months might be longer than two months.

5 THE COURT: I was going to have you define
6 what the meaning of "is" is, and what "two months" means.

7 MR. HAMMOND: I think we're talking about --
8 our guess was about -- the best we could imagine was about
9 30 trial days, so I guess that winds up being about ten weeks
10 on this Court's --

11 THE COURT: Yeah, I think I could accommodate
12 some of those weeks as four days. I think I would need one
13 law-and-motion day, probably, a week, but some of those I
14 could try to accommodate and still carry on the rest of my
15 calendar with having four-day weeks instead of three-day
16 weeks. But I understand, just based on what we have been
17 doing in here, what the likely length of trial is.

18 MR. HAMMOND: One other thought, your Honor,
19 before we go on.

20 THE COURT: Please.

21 MR. HAMMOND: One variable in that, that I
22 know we'll all have to deal with it at some point, is the
23 process of jury selection. And at some point, we would want
24 to propose to the Court some things that we think have worked
25 in other cases, in terms of the use of questionnaires and how

1 those might be integrated into a process that might make this
2 more efficient than it might otherwise be. But still, in a
3 capital case, everybody has to understand it takes a little
4 bit longer to select a jury.

5 THE COURT: I think everybody does understand.

6 MR. HAMMOND: So that is a variable that is on
7 our minds, as well.

8 THE COURT: All right.

9 So at this point, you are comfortable
10 with my sending you back for a proposal, essentially, from
11 each of you about a schedule for completing and preparing
12 some joint sort of management plan that would put us all on
13 the same sort of wavelength.

14 MR. HAMMOND: Well, I guess "comfortable" is
15 not exactly the word.

16 We want to get a schedule in place with
17 the Court's approval or one that's acceptable to the Court,
18 as soon as we can get it. I don't know how much of this
19 will -- if we don't disagree on it, I would just as soon go
20 ahead and get the dates at least tentatively locked in today.

21 MR. AINLEY: Well, I am going to disagree,
22 because the idea that the State could have all of the
23 disclosure made in 30 days is unrealistic, because often,
24 it's when you interview witnesses --

25 THE COURT: Even when it pertains to

1 substantive disclosure?

2 MR. AINLEY: No. I think that we can get --
3 well --

4 THE COURT: As distinguished from the
5 aggravating and mitigating phase elements of it.

6 MR. AINLEY: Well, I don't know where -- I
7 didn't talk to Steve Page today about where he is on his
8 report concerning all of the computer stuff, because he has
9 been spending all of his time copying stuff for the last
10 couple of weeks now rather than actually reviewing the
11 information. He is just copying stuff as fast as he can.

12 The other problem, of course, that you
13 run into, is you have your witness and you discover three
14 more documents that you didn't know about before the
15 interview. They pull something out of their briefcase and
16 say, "Oh, by the way, did you guys know about this?"

17 THE COURT: Well, you get to that point,
18 obviously, in every case, and sometimes you don't have all of
19 the answers that you need to have. We are a good ten months
20 post event.

21 MR. HAMMOND: And I believe, your Honor, that
22 the computers have been in the possession of the State for
23 that entire time. I think these were --

24 THE COURT: Give or take.

25 MR. HAMMOND: -- a day or two. They were

1 seized about ten months ago.

2 MR. AINLEY: Some were. Some were seized
3 after that.

4 MR. HAMMOND: Well, there certainly aren't any
5 that we know of that were seized more than about eight months
6 ago at the outside.

7 THE COURT: Tell me what you are thinking in
8 terms of having some discovery deadlines. If 30 days isn't
9 realistic, what do you think is more realistic?

10 MR. AINLEY: If I have to pick a date, Judge,
11 I would say 90 days.

12 THE COURT: And if they are at 90, where do
13 you think you are for your portion of the discovery,
14 Mr. Hammond?

15 MR. HAMMOND: Well, I must say, your Honor,
16 90 days is a long time, given how long we have already come,
17 but --

18 THE COURT: I guess my question, how much
19 after they do their discovery do you want for yours?

20 MR. HAMMOND: Whatever they do, I think we can
21 have our substantive case-related discovery done 30 days
22 after that date, whenever it is, and the sooner the better,
23 obviously, as far as we are concerned.

24 THE COURT: As you determine your
25 investigation and determine what they have, I think the

1 concern that I am hearing from Mr. Ainley -- and you may have
2 a corresponding concern -- is what happens if you discover
3 something later. What safety valve would you like me to
4 have?

5 MR. HAMMOND: Well, I think it is not uncommon
6 to have a provision in the order that would say for good
7 cause shown, discovery after the cutoff or disclosure after
8 the cutoff could be tolerated. And it might be that in the
9 course of an interview we will find something or they will
10 find something, but I would like the cutoffs to be close to
11 being pretty rigorous, I guess is the word I would use.

12 THE COURT: Okay. And then in terms of
13 cutoffs for motions, Mr. Ainley, there were some proposals
14 for disclosure of mitigation and aggravation taking place
15 after the substantive motion filing.

16 Any concerns or issues with regard to
17 that? Where do you want me to put them?

18 Obviously, I am not going to do a motion
19 cutoff before the conclusion of discovery, but what do you
20 think about having some deadlines for substantive motions and
21 the like.

22 MR. AINLEY: My first problem, Judge, is the
23 word "substantive." Who is going to decide what is
24 substantive and what isn't substantive?

25 THE COURT: Well, motions to suppress, for

1 example, are substantive.

2 MR. AINLEY: We are using the same term for
3 disclosure, and you are going to set a deadline on
4 substantive disclosure, and everything after that is going to
5 be deemed by the defense as substantive, and there is going
6 to be a cat fight over whether it is substantive or not
7 substantive.

8 THE COURT: The answer is me, I suppose.

9 MR. AINLEY: Well, I understand that. But the
10 rules say that the State has up until 20 days before trial to
11 disclose evidence. So I don't see where there is a basis for
12 limiting the State's disclosure when there is a rule that
13 deals with the issue.

14 MR. HAMMOND: There is a rule that deals with
15 the issue, and it's not 20 days before trial. The rule -- I
16 think we all know what the rule says, but it's pretty clear
17 that the discovery -- the disclosure of evidence intended in
18 a whole series of categories to be used by the prosecution is
19 to be 60 days after arraignment.

20 MR. AINLEY: If it exists at that point in
21 time or if it is known to the State, but we have documents
22 that are coming in on a daily basis that are being disclosed.

23 THE COURT: Well, I also think there is a
24 good-faith requirement by both sides to conduct sufficient
25 investigation to determine if such evidence exists or not.

1 Okay. I am going to set a deadline for
2 discovery to disclose and conduct your investigations in such
3 fashion as you can conduct some witness interviews of any
4 major witnesses that you have left to do that you haven't
5 already, and I presume that you have been doing some of that
6 so far.

7 I am going to give you 60 days to get the
8 discovery out for the State. I am going to give the defense
9 an additional 30 days for additional discovery, under their
10 obligations under Rule 15. And for good cause shown, I will
11 allow additional discovery to take place in terms of
12 disclosure.

13 I think that you need to set up some
14 witness interviews, and perhaps if you need me to look
15 over -- if you want me to participate in scheduling and
16 making sure that witness interviews are conducted so that the
17 case is proceeding along, I will set other interim pretrial
18 conferences to do that.

19 In terms of motions, the rules do
20 authorize me to set some deadlines on motion practice, as
21 well, so we can get them heard in a timely fashion.

22 If there is no objection, I am going to,
23 simply by virtue of the nature of the case from what I've
24 heard so far, designate it as a complex case, if I haven't
25 made that designation already.

1 Is there any objection to that?

2 MR. HAMMOND: I don't believe so, your Honor.

3 MR. AINLEY: No, sir.

4 THE COURT: So I will designate the case as a
5 complex case, and the rules that apply pertain to that.

6 What are your thoughts in terms of
7 witness interviews scheduling? Do you want me to set
8 forth -- do you want me to have you organize it so that you
9 set forth a schedule for conducting interviews and who is
10 going to do them and who is going to be present for those?

11 MR. HAMMOND: I think we can do that. When we
12 were preparing for today, I did not foresee that we would
13 have problems on the interview front. If we do, of course,
14 we will come back and see you. But I think counsel ought to
15 be able to do that without the intervention of the Court.

16 THE COURT: I would think, also.

17 With regard to aggravation/mitigation
18 materials, the State's already made some notice of intention,
19 as required by the law, with regard to the penalty.

20 Defense has a mitigation specialist, as I
21 understood it, that is working on this or not?

22 MR. HAMMOND: We have been in touch with a
23 mitigation specialist, your Honor, but I think I should
24 observe, at least for the record here, that there has not
25 been a Notice of Intent since the recent arraignment.

1 As the Court will recall that there
2 was -- after the first remand, there was a new arraignment,
3 and we have not had a notice since then.

4 THE COURT: Is there a notice coming?

5 MR. AINLEY: Yes, sir.

6 THE COURT: So the re-indictment hasn't
7 changed the State's attitude with regard to seeking the death
8 penalty?

9 MR. AINLEY: No, sir.

10 MR. HAMMOND: I take it it also may not have
11 changed materially the aggravators identified.

12 MR. AINLEY: Correct. It's exactly the same.

13 MR. HAMMOND: But I do think we need to have
14 that.

15 THE COURT: I agree. You need to formalize
16 that as required by the rules.

17 Are you seeking any additional orders
18 from the Court with regard to investigation, mitigation
19 specialist, and those sorts of things, yet?

20 MR. HAMMOND: Not yet, your Honor.

21 THE COURT: I recognize that that may come at
22 some point.

23 The rule speaks of the filing of those
24 motions and those being triggered by certain events as the
25 basis for them, although I recognize that we went back to the

1 grand jury on this case and there was a re-indictment.

2 What are your thoughts about when you are
3 going to get the Notice of Intent filed and Notice of
4 Aggravating Factors filed, Mr. Ainley?

5 MR. AINLEY: End of this week.

6 THE COURT: And any additional disclosure
7 pursuant to that that you gentlemen are going to be making
8 that you conceive of now, or are you simply going to repeat
9 what was already in the Court's file before?

10 MR. AINLEY: It will be the same, but I signed
11 more disclosure earlier -- either earlier today or yesterday,
12 Judge. We have more disclosure going out all the time.

13 THE COURT: What is realistic in terms of the
14 discovery disclosure of aggravation/mitigation from your
15 relative perspectives if I set the 60 days out for State's
16 additional disclosure and 90 days out from today for
17 additional defense disclosure?

18 MR. HAMMOND: Your Honor, as I read the rule,
19 I think the State's disclosure of information with respect to
20 its aggravators and the mitigation is supposed to be 30 days
21 after the notice. They have told us, I think, about four
22 aggravators. I don't believe that they have made any
23 production with respect to those four topics.

24 And I think it is very important to how
25 this case proceeds. So from our standpoint, we would like to

1 have that disclosure as soon as reasonably possible.

2 THE COURT: So if we are triggering the Notice
3 of Intent this week, 30 days subsequent to that would be the
4 State's additional disclosure under Rule 15.1(i)3, I think is
5 what the number is.

6 MR. HAMMOND: That's correct.

7 THE COURT: And then the defense motions
8 pursuant to 15.9 would be within -- I think it is 60 days
9 after that. All of this was originally triggered from the
10 arraignment which, as we know, has replicated itself by
11 virtue of sending the case back to the grand jury. But it's
12 about then another 90 days after, isn't it? So we are still
13 talking about along the lines of what you were speaking of in
14 terms of the additional disclosure of mitigation and the
15 State's rebuttal evidence.

16 Do you want me to go ahead and set those for
17 the end of October for mitigation?

18 MR. HAMMOND: Well, the mitigation side of
19 this, because of the investigation that needs to happen after
20 we received the State's information, the rule calls for 180
21 days.

22 THE COURT: I recognize that.

23 MR. HAMMOND: And I understand our desire is
24 to get this thing moved along. I think someday maybe could
25 we agree to 120 from the disclosure, the date that their

1 disclosure is completed? That would accelerate that
2 180 days.

3 THE COURT: I need to look at the calendar.
4 Their disclosures, they are talking about completing that, I
5 think by about mid-June, then, Mr. Ainley.

6 If you received that June 22nd or
7 thereabouts, and you are allowed to do the motion for
8 mitigation specialist thereafter and to disclose mitigation
9 of witnesses within, essentially, 180 days of that, that is
10 going to put us into December.

11 Is that what you are looking for?

12 MR. HAMMOND: I think that would be
13 acceptable, your Honor. If we have it done by then, I still
14 think we can then look for the rest of the pieces falling in
15 place for a trial date in the Spring.

16 THE COURT: All right.

17 So State's additional disclosure,
18 Mr. Ainley, are you comfortable with June 22nd? Do you want
19 to make it June 30th, the end of June, as a way of having
20 some easy-to-remember numbers for the aggravating disclosure?

21 MR. AINLEY: Yes, sir. However, there is not
22 going to be a lot of information that is separate and apart
23 from the primary disclosure in this case.

24 THE COURT: That may be.

25 MR. AINLEY: Okay.

1 THE COURT: Then, essentially, it's -- 180
2 days from that would be the end of December. So I will set
3 the end of June for the aggravation disclosure. The end of
4 December for the mitigation defense disclosure of mitigation
5 witnesses and experts for penalty hearings under Rule 15.2.

6 State's rebuttal is typically within
7 60 days after that, which would put us the end of February,
8 2010 for that.

9 And defendant's disclosure of rebuttal
10 witnesses, typically -- for the penalty hearing is typically
11 60 days after that, which would put us the end of April.

12 Is that the schedule that you are looking
13 for?

14 MR. HAMMOND: Approximately. As long as we
15 could then anticipate that we would be moving promptly into a
16 trial.

17 THE COURT: All right.

18 And do you want me to set a trial date at
19 this point for the initiation of the trial, anyway?

20 MR. HAMMOND: I think that is our preference.

21 THE COURT: I think I need a 2010 calendar.

22 MR. BUTNER: Judge.

23 THE COURT: Mr. Butner.

24 MR. BUTNER: Thank you.

25 Judge, I'm hearing these dates and so

1 forth, and I understand that the defense -- and we want this
2 case to be moving along, too. But at this point in time, we
3 have disclosed, as Counsel states, over 5,000 pages of
4 documents. We still have a whole bunch of stuff that we
5 haven't even looked at yet. And I am worried about setting a
6 trial date when we are still knee deep, at the least, in
7 disclosure. I just don't think that that makes much sense
8 from anybody's point of view.

9 I want the case to go along, too. Even
10 with putting those dates out there, Judge, we are not going
11 to interfere with your calendar once we get down the
12 disclosure road and decide that, okay, we can set a trial
13 date now, and it's probably going to be six months away.

14 THE COURT: I am not set, Mr. Butner,
15 Mr. Hammond, Mr. Sears, into anything past October currently
16 on anything that I am doing. So there is not a particular
17 need at this point to set a trial date, but within 90 days or
18 so, when we know a little bit better about where we are
19 going, then certainly can still set a trial date in the time
20 frame you are thinking of.

21 MR. BUTNER: And that's exactly my point,
22 Judge. I mean, why don't we wait until we kind of come to an
23 end of the discovery stage, so to speak.

24 THE COURT: Well, I need you to keep working
25 on the case, and probably work harder on the case than you

1 have been doing, because I don't know that you've been -- and
2 I will grant that we have had hearings that have -- you know,
3 Simpson hearings and such, where people have testified, and
4 there is some knowledge on your part, and you have had
5 investigators out assisting you and continuing discovery
6 being made. But there are witnesses that need to be
7 interviewed and other motions that need to be made in
8 connection with the case and moving it along.

9 So I can set another pretrial and have
10 you all set forth for me who you are going to interview and
11 over what span of time and how many are going to get done by
12 the time we meet the next time. But I think I need to
13 have -- I mean, I don't need to babysit anyone, especially
14 with experienced practitioners like yourselves. But we need
15 to go forward in a way that is actually preparing the case
16 for a trial, or if there is going to be some settlement
17 conference or attempted resolution of the case in front of a
18 settlement judge other than myself or, less likely, in front
19 of myself, I think you need to start thinking about those
20 things also.

21 Mr. Sears.

22 MR. SEARS: Judge, I wanted to welcome
23 Mr. Butner to the show here.

24 MR. BUTNER: Thank you, Mr. Sears.

25 MR. SEARS: There are a couple of things I

1 wanted to point out that I think maybe because I practice in
2 this community I have more direct information about it and
3 concern, and that has to do with the Court's own trial
4 schedule, and I am not sure -- I am glad somebody can laugh
5 in the room.

6 THE COURT: It's either laugh or cry,
7 Mr. Sears.

8 MR. SEARS: That would be a rueful laugh, I
9 suppose.

10 It has to do with at any one point in
11 time what the lead time would be to get ten weeks or more of
12 the Court's uninterrupted time with some special four-day
13 weeks thrown in there. So my concern -- I feel confident
14 that we can sit here today, and if we can find a 2010
15 calendar be pretty comfortable that you have that amount of
16 time in May.

17 But my concern is if we go into
18 September, October, November, and still haven't set a trial
19 date and we do that, I don't know how far out in advance -- I
20 don't sit here frequently enough to know when you are setting
21 trials now, because it seems like it's always --

22 THE COURT: Now I am into October.

23 MR. SEARS: Well, that is five months, so if
24 we were in -- I just have a concern that -- because the other
25 thing that we haven't yet talked about, yet, are blocks of

1 time after the motions are filed and before the trial for the
2 evidentiary hearings that we think are going to be attached
3 to a lot of these motions. And I know from experience in
4 this case and experience in lots of lots of cases in this
5 court, that that is more difficult.

6 THE COURT: I don't have lots of time.

7 MR. SEARS: So today if we started picking
8 time, for example, if we could work backwards, we could set a
9 trial date in May of 2010, with all the other dates that you
10 have in between for the aggravation/mitigation disclosure,
11 and then look out past October, knowing that you booked
12 yourself full then, and, say, maybe find some dates in
13 November before they run away, full days for evidentiary
14 hearings so that we are not in the unfortunate situation of
15 doing a four-day hearing over seven or eight weeks. In this
16 case, I just don't think that serves the Court well or
17 anybody else well.

18 THE COURT: I agree with you.

19 MR. SEARS: So if we could pick a couple of
20 weeks in, say, November or -- end of November or early
21 December, now that we know that you might have a blank slate,
22 and designate those days for evidentiary hearings. I think
23 that would be good.

24 And in order to do that, having a trial
25 date, at least a bookmark trial date of May 1, makes us feel

1 confident that everybody will focus. There is something
2 about having the light at the end of the tunnel that helps
3 everybody refine their view of what is happening. If we
4 didn't have a trial date and we were just proceeding, our
5 client sits in jail while this is pending, Judge.

6 THE COURT: You may not have a trial on
7 May 1st of 2010. It's a Saturday.

8 At the current time, how many days are
9 you looking for, for motion hearings in the time frame of
10 November, December?

11 MR. HAMMOND: I would think something in the
12 nature of six days, which I guess on your calendar would be
13 two weeks. I don't know how you do those when they are
14 motions.

15 THE COURT: I don't know how I am going to do
16 a lot of this with the caseload that I have for even the less
17 serious cases that are assigned to me.

18 Do you folks have any plans in there for
19 any time that Mr. Sears and Mr. Hammond and State's counsel
20 are going to definitely be out of town because of
21 Thanksgiving or other --

22 MR. HAMMOND: No.

23 THE COURT: -- family obligations?

24 MR. SEARS: No. This is it.

25 MR. HAMMOND: That is one of the benefits of

1 getting them established now, I think, is that they can take
2 precedence over other foolish decisions we can make later.

3 THE COURT: You guys are all old enough. Your
4 kids are grown, too, for the most part, except Mr. Ainley.

5 MR. BUTNER: Judge, are we talking about six
6 days sometime in November or December?

7 THE COURT: Yes.

8 MR. BUTNER: I don't have anything then, and
9 it sounds like a really good idea and good time frame to do
10 it.

11 THE COURT: I am not sure I am going to give
12 you six days right now. I think I am probably going to be
13 cheaper than that for you. I apologize. I probably will
14 just give you four, at this point.

15 And to the extent that we need more time,
16 I think I can still figure that to within a couple of months.
17 Let me know.

18 MR. HAMMOND: Judge, if we are going to do
19 that, I wonder if we could at least tentatively set --

20 THE COURT: I can do tentative, Mr. Hammond,
21 but I am not sure about the firmness of what I am going to be
22 able to do, given the rest of the trials that I have.

23 MR. HAMMOND: What I wanted to suggest is that
24 if we can't lock in six days now, let's lock in as many as we
25 can in November, and then I think we ought -- for reasons of

1 prudence, we ought to be scheduling another block as soon
2 after the first of the year as we can.

3 THE COURT: That might make more sense to me.
4 The problems with -- some of the problems with November are,
5 of course, the two holidays that are necessarily there --
6 Thanksgiving and Veterans Day.

7 Do you want something -- and honestly, I
8 don't have a calendar with regard to which day is
9 Thanksgiving.

10 MR. BUTNER: November 26, Judge.

11 THE COURT: Thank you. So the weekend between
12 the Veterans Day and Thanksgiving, then, would have Tuesday
13 the 17th, Wednesday 18th, Thursday 19th, and Friday the 20th.
14 I could probably just reserve those four days at this point.

15 MR. AINLEY: Those days work good for us, I
16 think.

17 MR. HAMMOND: Those are fine with us.

18 THE COURT: So I will ask Martha to put those
19 on my calendar as Democker motions and I will try not to set
20 any other hearings in connection with that.

21 And then with regard to the -- January, I
22 could give you a couple more days. How many do you think you
23 need at this point in January?

24 MR. SEARS: I think in terms of evidentiary
25 hearings, we are going to need at least two, but I think

1 there are going to be other motions that the Court is going
2 to be asked to -- because I think if we could block out
3 four -- maybe two and two.

4 THE COURT: Again, we have a civil rights
5 holiday in the third week of -- third Monday of January,
6 which would be the 18th. So the 19th would be a
7 law-and-motion day. That would only leave three days
8 remaining that week.

9 Do you want to go the week before or the
10 week after that? The last week of January would be the 26th,
11 27th, 28th, and 29th.

12 MR. HAMMOND: I think the week before would be
13 preferable to us, if it is open.

14 THE COURT: Everything is open right now.

15 MR. HAMMOND: I think taking the earlier one
16 would be preferable to us.

17 THE COURT: So the 12th, 13th, 14th, 15th.

18 I will have Martha reserve those for the
19 time being, as well, for Democker motions.

20 And I will tell Judge Kiger and
21 Judge Brutinel I don't need any more cases. I am sure they
22 will oblige me.

23 MR. BUTNER: That's what I am going to tell my
24 boss too, Judge.

25 THE COURT: Good. Good.

1 All right. And then in terms of
2 pointing at a trial date, we would be pointing at something
3 in May. As I said, the first of May is a Saturday -- next
4 year.

5 Potentially, we could start a trial on
6 the 4th or 5th, though, if you wanted to point in that
7 direction for the time being.

8 MR. HAMMOND: Mr. Sears says he would prefer
9 Cinco de Mayo.

10 MR. SEARS: President Obama said Cinco de
11 Quatro.

12 THE COURT: I didn't hear that. He comes from
13 a different part of the country.

14 MR. SEARS: Judge, if we could make that first
15 week -- or the first couple of weeks, if there is any way to
16 make those four-day weeks. Dealing with jury selection, in
17 my experience, the matter of down time you have --

18 THE COURT: Quatro de Mayo instead of the
19 Cinco de Mayo.

20 That's what I'll point to at the time
21 being, but that's not etched in granite, for your peace of
22 mind --

23 MR. HAMMOND: Thank you, Judge.

24 THE COURT: -- Mr. Butner.

25 MR. BUTNER: Right.

1 THE COURT: But let's keep that in mind.
2 That's what I will tentatively set it for, and if we need to
3 move it to some degree forward or back, we can have that
4 capability.

5 At this point, I don't have anything
6 scheduled that far out, so the closer I get to it, the
7 tighter it's going to become, so we'll need to discuss that
8 at future settings.

9 What do you think I need to set next in
10 terms of -- do you want me to simply set the end of September
11 as the cutoff for some of the motions? Do you want me to --

12 MR. HAMMOND: It does seem to me -- I mean,
13 and let me --

14 THE COURT: Maybe I don't need to set any
15 cutoffs per se. I need to just have you file the motions in
16 a timely fashion and pointing toward having the hearings in
17 the time frame that we set, and just simply have another
18 pretrial conference where I would let you all talk amongst
19 yourselves as a defense team, as a prosecution team, and then
20 have some discussions with each other and give me a proposed
21 case plan that would allow us to have some cutoff of motions
22 in a timely fashion, have them heard so that we aren't 20
23 days before the trial.

24 I am going to have a cutoff of motions
25 where we are not hearing a bunch of motions the week before

1 trial. I don't want to see that happen.

2 We are a long way off from where the
3 trial date is set. If you have diligent efforts made toward
4 getting the case to trial, I think that you can do that.

5 But I want a motion cutoff where I am not
6 holding -- I guarantee you, I am going to have other trials
7 that are going to have to be going the week before May 4th or
8 5th, and the likelihood is that I am not going to be able to
9 have a lot of time devoted to having last-minute motions
10 being heard. So I want to have some deadline for motions
11 that is in advance of what the 20 days allowed by the rules
12 might be.

13 MR. HAMMOND: And I think we have a common
14 interest in that, your Honor.

15 One possibility might be on the motions
16 that relate to disclosure and that might also relate to these
17 evidentiary hearings we are having in November, if we backed
18 up from the 17th of November, which is the first day of those
19 hearings, so that there would be a reasonable period of time
20 for motion response and reply, I think that puts us back into
21 September for filing motions with respect to disclosure
22 issues.

23 MR. BUTNER: Judge, if I might -- I was trying
24 to do the math, so to speak, with the 30, 60 days and all of
25 that stuff. And I got to tell you, too, I am on this case

1 now, and I have a family vacation in July that's a wedding
2 that I have go to, and I am going to be gone about a week.

3 If we just do it in 30-day increments, so
4 to speak, then we can do it at the end of each month. So if
5 we're at the end of July, that's July 31st. That is the
6 State's discovery cutoff. At the end of August, that is
7 defense discovery cutoff. At the end of September, we've got
8 the motion cutoff. And for filing purposes, responses
9 followed thereafter, you know, and then we are arguing the
10 motions --

11 THE COURT: If the motions are filed by
12 September 30, that gives plenty of time for response and
13 reply in order to have oral argument and evidentiary hearing
14 set on the 17th of November.

15 MR. BUTNER: Exactly. So it kind of works out
16 if we go that way. It makes sense to me, but that is just
17 me.

18 MR. HAMMOND: So that winds up with the -- I
19 still want to be sure that I understand where we are on the
20 disclosure cutoff.

21 I think that your suggestion would put us
22 at the end of July for disclosure.

23 MR. BUTNER: That's absolutely correct.

24 THE COURT: And then end of August for defense
25 disclosure?

1 MR. BUTNER: Exactly. That gives us a little
2 more than 60 days, I know.

3 THE COURT: End of September for filing of the
4 motions, then.

5 MR. HAMMOND: I would urge that we have our
6 disclosure date. I think the Court said earlier 60 days.
7 That is -- we are now adding another two weeks onto it.

8 MR. BUTNER: That's right. We sure are,
9 Judge. And the problem is that we've already disclosed 5,000
10 pages of documents. We've told the defense about 60 disks
11 that we know of that we haven't even gotten done copying yet,
12 and I am really worried about it.

13 THE COURT: Have you received disclosure from
14 the defense at all?

15 MR. AINLEY: Not a piece of paper.

16 MR. SEARS: The triggering time for our
17 disclosure is when the State's completed its disclosure.

18 MR. BUTNER: We know that.

19 THE COURT: There is the ongoing obligation of
20 disclosure, Mr. Sears. And if the State has listed its
21 witnesses and provided you with 5,000 pages of discovery, I
22 don't think that you are triggered by that. I think that you
23 have an obligation to present your witnesses and disclosure
24 in a preliminary fashion with a continuing obligation to
25 disclose under Rule 15, just the same as they do.

1 MR. SEARS: I would certainly agree with the
2 Court.

3 THE COURT: I didn't think you didn't
4 disagree.

5 MR. SEARS: If the 5,000 pages had been
6 disclosed in a timely fashion, but we are ten-and-a-half
7 months out from this event. We're eight months plus out --

8 THE COURT: How many of the 5,000 were
9 disclosed in the first month or two?

10 MR. SEARS: Less than a thousand, the first
11 time around.

12 THE COURT: A thousand were disclosed.
13 There's an obligation, it seems to me, for you to do your
14 disclosure and for them to continue with their disclosure
15 obligations, also. I don't want to get into an argument with
16 that. I recognize that there is a continuing obligation by
17 both sides to do disclosure.

18 MR. SEARS: Here's the problem. The way in
19 which the State's disclosure has been constructed thus far is
20 a particular problem for us because almost all of what we
21 need to even understand the basis for what the State is
22 saying about our client was, as Mr. Hammond pointed out, in
23 the possession of the State within the first few days after
24 the death of Carol Kennedy. But much of it, if not most of
25 it, is still in the process of being copied.

1 Mr. Ainley and Mr. Butner talked about
2 computers that are being copied. These are the same
3 computers they have had at least eight months, mostly ten
4 months in this period of time. And it's all going to come to
5 us in this big discovery dump, at this point. And this is
6 not the kind of case, for example, like a D.U.I. or a
7 burglary, where there is a discrete set of facts and you get
8 information, and you know within a relatively short period of
9 time what you are going to do in defense of it.

10 This case -- the travel of this case and
11 the theory of the case has shifted and changed over a period
12 of time, which compounds the problem caused by this -- what
13 we think is a remarkable delay in getting the basic
14 discovery. We've sent discovery letters the Court doesn't
15 know about, that the State has responded to.

16 And the most recent response we got was
17 that the State was still in the process of copying documents
18 in this case. And we're really at a loss to understand why
19 it has taken the State eight to ten months to copy documents
20 that we think have been in their possession virtually all
21 this period of time.

22 For example, we just received on Friday
23 several hundred pages of journals that we have been asking
24 for. These were journals seized within the first couple of
25 days after Carol Kennedy died. These are her journals.

1 We've been asking for them. They arrived on Friday.

2 So in defense of our position, our
3 discovery responsibility, it is not that we are delaying or
4 we're trying to hide the ball in this case. This has really
5 been a difficult challenge for us to understand even the
6 basics about the State's case. They continue to investigate
7 it in a way that we are not accustomed to.

8 In our experience, in homicide cases, the
9 investigation happens, they come to a conclusion. There are
10 some times when they pick up new leads and things like that,
11 but the bulk of the investigation is done at or about the
12 time the defendant is charged.

13 In this case, there are subpoenas in this
14 disclosure for documents that I think they've known about,
15 again, for eight or ten months, subpoenas dated within the
16 last few weeks for documents, which I think are some of the
17 things that Mr. Ainley is talking about, things that come in.
18 It's a moving target. It's very, very difficult for us to
19 get our arms around -- literally around discovery. But to
20 understand where it's going, when it's going to end, and
21 where they're going to look next and what they are going to
22 do next. And it's very difficult for us.

23 We could give them a one-page or two-page
24 proforma discovery document that says we're still looking and
25 we're waiting for you to finish, and then we'll tell you in

1 more detail down the road. We didn't think that was really
2 worth the effort. But the dates that the Court has set
3 originally -- not the dates that Mr. Butner has proposed
4 pushing back a bit, but the original dates to us, to be a way
5 to get this case past the discovery stage, into the motion
6 practice stage and teed up for a trial within the time period
7 that the Court has now set.

8 But what we can't, I don't think, afford
9 to do is push it back even a few weeks. It's not so much
10 that, you know, we don't want Mr. Butner to go on vacation
11 for a couple of weeks, but there's a point in which the
12 longer the State takes to get its discovery done, the more we
13 are backing up in response to it, and the shorter time
14 periods we have to evaluate this and decide what it is that
15 we are going to file in our list of motions that we file in
16 September. I can just hear the complaining now. If we have
17 all of the stuff and we're pressed for time and file a bunch
18 of motions, we are going to hear from the State that we filed
19 so many motions that they can't possibly respond to them in
20 the 30 days that Mr. Butner suggests, and we can't possibly
21 get them heard.

22 That is not the way we would want to do
23 it. We wished that the State had investigated this case
24 first, rather than charge first and then investigate it. But
25 we're stuck with the way the case has traveled and we're

1 doing our best to try and respond to it.

2 Our concern is the more that the State
3 moves forward in investigating and delaying the discovery
4 cutoff, the more pressed we are going to be in every
5 respect; in our discovery obligation, in our motion practice,
6 in the time set for hearing, if we want to get this case to
7 trial a year from now. Suddenly, that year does not seem so
8 far away, if we don't hold the State to some basic
9 obligations.

10 Remembering that discovery date that we
11 proposed, the cutoff was more than a year after this murder.
12 I just don't think that's an unreasonable period of time
13 within which the State should be required to complete their
14 basic investigation in this case.

15 So I hear what Mr. Butner is saying, but
16 I would urge the Court, has Mr. Hammond did, to just find a
17 way to stick to these benchmark times. They seem to make
18 sense. It seems to us to be more than enough time to get
19 this work done so that we are not cut short as a result of
20 the State taking more time than is necessary.

21 Thank you.

22 THE COURT: Who wants to --

23 MR. BUTNER: I want to. Judge, Mr. Sears and
24 I have worked on cases on opposite sides for a number of
25 years in this court. I think the Court knows that I am not a

1 foot-dragger on disclosure.

2 This case, just like practically any
3 other homicide case that any of us have ever been involved
4 with, kind of has its own pace, so to speak. We've got
5 thousands of pages of discovery we've provided. I think we
6 are going to end up providing thousands of pages more, quite
7 frankly, from what I have seen, and I haven't been involved
8 with this case very long.

9 I don't think that it is much to ask that
10 we take a look at the schedule that we are trying to set out
11 and make a reasonable attempt to do this so that nobody's
12 feet are being held to the fire, here. We don't ever end up
13 holding the defense's feet to the fire either, quite frankly,
14 because we all know what happens when you do that. We end up
15 coming back and doing it all over again, and nobody wants to
16 do that.

17 The State's been diligent, and we are
18 going to be diligent, and we are going to get the discovery
19 done as promptly as possible. I simply would suggest that it
20 makes sense to put the discovery cutoff at the end of July.

21 And I've expressed my own little personal
22 problem. I realize that it probably shouldn't even weigh in
23 on this, but nevertheless, I put it out there.

24 I think it makes sense, and if the
25 defense needs a little more time for discovery, we are not

1 going to be whining about that either, Judge. But with the
2 evidentiary hearings set schedule, I think that is a
3 reasonable request of the Court -- at the end of each of
4 those months and, you know, for good cause, of course, we can
5 get extensions.

6 THE COURT: What are you talking about that
7 still needs to be done to have the State complete its
8 discovery disclosure?

9 MR. AINLEY: Well, Judge, let me just correct
10 something that Mr. Sears has said. He talked about the
11 journal pages --

12 THE COURT: As long as you answer my question
13 when you're done.

14 MR. AINLEY: All right. He just mentioned the
15 journal pages. Photographs of each one of those journal
16 pages were disclosed in November of 2008. In March of 2009,
17 defense counsel sent a letter saying, well, you sent us the
18 photographs, but now send us a copy of each page. So we sent
19 them copies of the pages for the request that was made March
20 of 2009, because they apparently didn't like the photographs
21 of the pages that we sent them in November of 2008.

22 So we keep getting requests from them to
23 duplicate things that we've already sent to them. Our
24 responses routinely are "That was sent to you already on this
25 date," so we are getting redundant requests, and they don't

1 like the format of a particular item and want it changed in
2 some way.

3 How much more? I don't know. I approved
4 a stack of documents this thick yesterday for disclosure to
5 the defense.

6 THE COURT: What is your thought about what
7 remains to be done in terms of the investigation that needs
8 to be disclosed before whatever date is set for a cutoff, for
9 any kind of cutoff in any semblance of the meaning of that
10 word?

11 MR. AINLEY: I can tell you that there are
12 things that I am still trying to get. Is that what you want
13 to hear?

14 THE COURT: Yes.

15 MR. AINLEY: I want to get Mr. Fruge's file
16 concerning the divorce. The State had filed a request for
17 that or discussed it with the Court earlier. Mr. Sears took
18 it upon himself to -- or as a friend of the Court -- to file
19 an objection stating that privilege still pertained, but that
20 completely overlooks Benton v. Superior Court, which says the
21 State can override privilege and get those sorts of
22 documents.

23 I have a request in to Amazon.com
24 concerning some books ordered by Mr. Democker. Got an
25 objection from the attorney for Amazon.com, saying that they

1 won't comply with our subpoena because they are invoking
2 Mr. Democker's First Amendment rights on his behalf. I don't
3 know how they get that, but that was the response.

4 THE COURT: In terms of the items that are in
5 the State's possession now, are you anticipating additional
6 computer information that's --

7 MR. AINLEY: I talked to Steve Page earlier
8 today, Judge. He told me that he thought that he could have
9 that stuff by the end of next week. There is one problem.
10 There is -- well, there's a couple of different problems.

11 There is the one I raised earlier about
12 some photographs and movies that we need to get court orders
13 concerning.

14 They requested a download of a
15 BlackBerry. We don't have the password for the BlackBerry.
16 We can't download it without the valid password that would
17 have to be supplied by Mr. Democker. That is the problem.

18 There are electronic devices that have no
19 way of being downloaded because there is no port on it that
20 allows you to download it. So the only way that the defense
21 is going to be able to look at it is to come and look at the
22 actual physical item, or for us to shoot photographs of each
23 screen and then send photographs. But then, of course, they
24 won't like the photographs, and they'll want us to run it
25 through a Xerox machine.

1 THE COURT: I think I will stick with where we
2 were before in terms of the discovery and like the State to
3 reasonably conclude the discovery that it can, subject to the
4 continuing obligation to do the additional disclosure -- to
5 produce your disclosure to the extent you can of what you
6 have in your possession by June 22nd.

7 And then I had indicated, I thought, a
8 deadline for the defense. I need you to get off the dime and
9 do some disclosure, even if it's going to be duplicated or
10 supplemented later, Mr. Sears, and I think the end of July
11 would make sense for that.

12 MR. HAMMOND: That is fine.

13 MR. BUTNER: So the State's cutoff is
14 June 22nd, Judge?

15 THE COURT: Yes. But I recognize there is a
16 continuing obligation to disclose other materials and conduct
17 your investigation, and I am not going to be unreasonable
18 about doing it. But I need you to get done what you can so
19 as to allow the defense to go ahead and do their disclosure
20 also.

21 MR. BUTNER: Judge, you know that that is not
22 60 days out. That's 40 days.

23 THE COURT: I know that. I know.

24 MR. BUTNER: Okay.

25 THE COURT: But as I say, I am not going to --

1 I think we need to get going on this stuff and to schedule
2 witness interviews and the like.

3 So what I want you to do, Mr. Sears, is
4 to go ahead with the witnesses that you anticipate calling
5 now, as soon as possible, to provide that list to the State,
6 the mutual schedules for -- to be exchanged for starting to
7 conduct witness interviews so that we are progressing to be
8 able to have you file substantive motions by the end of
9 September.

10 I am going to let you do motions in
11 limine after that, but I think that is probably what I ought
12 to reserve for the January setting, if there is some
13 additional motions in limine. But it seems to me that the
14 preliminary motions, if there are suppression motions or
15 identification motions or things of that nature, that is what
16 we ought to point toward for the November time frame.

17 What else do you -- I would like from
18 both sides a proposal of the conference memorandum and
19 pretrial conference that we could address any other issues in
20 how you are coming along in terms of interviews and the like,
21 at some point, perhaps in beginning of July, so that I know
22 that you are progressing on it. I would like some better
23 feel for -- and maybe I ought not request that of you before
24 the defense disclosure is due --

25 MR. BUTNER: Thank you.

1 THE COURT: -- but realistic appraisal of the
2 trial date and where we have it proposed to be set currently,
3 better idea of length of trial, identification of who the
4 witnesses are, what dates you want for a final or interim
5 schedule of management conferences, witness interviews
6 schedule, any other production for discovery purposes that
7 you think you are going to need to have your experts take a
8 look at State's evidence, an identification of the motions
9 that you anticipate I am going to need to hear in the
10 November and January time frames, if there are any issues
11 relating to experts, any particular special investigative
12 needs that you have, mitigation expert needs, what you are
13 proposing for settlement conference if you want one and in
14 front of whom, cutoff for any plea negotiations, a date for
15 that.

16 So those sorts of things, it will be in
17 the minute entry -- I assume that Rachel is keeping up with
18 me on that -- I would want that kind of an overall
19 calendaring kind of schedule from you. I want you to meet
20 and confer or call and confer, as the case might be, between
21 both sides so that I have something that both sides can live
22 with beyond what we already talked about today.

23 Does that make sense?

24 MR. HAMMOND: I think that is a great idea.

25 THE COURT: And I think I would want that

1 perhaps mid-August. We should have a better idea
2 approximately then. So if you have any preferences, I am
3 willing to listen, but maybe -- the 17th is a Monday. The
4 21st is a Friday, if you want to --

5 MR. HAMMOND: What's the Monday date, the
6 21st?

7 THE COURT: The 17th of August is a Monday.
8 The 21st is a Friday. The 24th is a Monday.

9 MR. HAMMOND: The 21st, then, your Honor.

10 THE COURT: Friday the 21st, then, I would
11 expect to receive from you some listing of these items that
12 gives an additional schedule some more definition to what I
13 can expect.

14 If you have some idea of potential motion
15 in limine issues that I might need to address, if you would
16 please address those in the schedule, also, and how much time
17 we might need for each of those, whether an evidentiary
18 hearing is going to be needed for any of them. So what I am
19 generally thinking about is substantive -- more substantive
20 motions in the November time frame; motions in limine, more
21 in the January time frame, because you will have a better
22 idea of what the legal issues might be and how the motions in
23 limine -- how the evidentiary issues might affect the need
24 for a motion in limine, so that we start hammering out how
25 the trial is going to go.

1 I expect that we probably would have to
2 distribute a jury questionnaire, if you intended to do that.
3 Perhaps if you would address that in terms of a time frame.
4 But we probably would want to have it distributed at least a
5 couple of weeks, if not three weeks in advance of where the
6 trial is and some parameters for it, how long, you know -- I
7 think if you make it too long, you are going to get responses
8 that are less thought out.

9 So you might want to address whether you
10 think a jury questionnaire is appropriate and how many pages
11 it ought to be and don't make the type so small in order to
12 fit it in the page limits that us older people would have
13 trouble reading. I guess that includes everybody here.

14 MR. BUTNER: From the point of view of the
15 State, to make it clear, I prefer that we not do a jury
16 questionnaire. I think that we end up duplicating our
17 efforts, quite frankly, but we can talk about that further --

18 THE COURT: I have had some experience on both
19 sides of that issue. I am not sure I disagree, but I am
20 open-minded, in any particular case, about that. This one,
21 obviously, has had more publicity than some cases have had.
22 It may be less than others.

23 But that is always at least one concern
24 for the jury questionnaire, is simple availability of the
25 numbers of jurors that we are calling in. You are all

1 familiar with the limitation on seating capacity in the
2 various divisions for distribution and selecting of jurors
3 and that sort of thing. But it's always an issue -- pretrial
4 publicity is always an issue, availability for a lengthy
5 trial, those issues. So potentially, at least, it could be
6 addressed in such a questionnaire.

7 MR. AINLEY: What time on the 21st?

8 THE COURT: I am not looking for a hearing
9 time, necessarily, for that. I think I do need to set some
10 hearing out from today so that I know that you are doing what
11 you are supposed to, and I was talking about July. What I
12 was looking for on the 21st of August was actually a docket
13 that sets forth a schedule for these things.

14 So it is going to take some advance
15 preparation before that and some conference between the two
16 sides to try and hammer out whatever issues you have in
17 dispute and see if you can resolve them, of course. And if
18 you give me a majority report or minority report or defendant
19 and defense report and prosecution report about what you
20 would like to see in connection in which it's different,
21 that's fine, too.

22 What I was thinking about was having
23 something, I think, in July to see where we stand at that
24 point.

25 MR. HAMMOND: Status conference?

1 THE COURT: Status conference.

2 If you want to have Mr. Democker here, he
3 is welcome. If you want to simply have the lawyers meet and
4 confer with me, that is fine, too.

5 MR. SEARS: We would like Mr. Democker to be
6 present.

7 MR. HAMMOND: We would prefer to have him
8 present, and we think a date in July would be a good idea.

9 THE COURT: Mr. Butner, you said you are going
10 to be gone at some point in July. Do you want me to put it
11 someplace when you are going to be here?

12 MR. BUTNER: I would prefer that.

13 THE COURT: Tell me, then, when you are going
14 to be gone.

15 MR. BUTNER: I'm going to be gone the last
16 part of the week of July, beginning July 7. So the 9th,
17 10th, 11th, and the 13th.

18 THE COURT: And so you would be back the 20th
19 and 21st?

20 MR. BUTNER: Yes, sir.

21 THE COURT: That would work best for me,
22 because I am gone on parts of the following week -- the last
23 week of July.

24 It would probably work best for me
25 Tuesday, July 21st, if that is okay with defense counsel.

1 MR. HAMMOND: It is.

2 THE COURT: Okay. And be prepared, if you
3 would, please, to tell me what interviews have been done
4 already and what are scheduled, if you can. I would like to
5 see some action toward that by both sides.

6 Tuesday, July 21st, 2009, 9:00 a.m.
7 for -- if that's okay. You are coming from Phoenix?

8 MR. HAMMOND: That's fine.

9 THE COURT: -- for pretrial conference,
10 Mr. Democker to be present.

11 Anything else that you think I need to
12 take up today, Mr. Ainley, Mr. Sears?

13 MR. SEARS: Your Honor, there is a matter of
14 some urgency involving some security issues, and I think they
15 would be addressed, if the Court was willing to do it, better
16 in chambers. I would like them on the record, and I would
17 like to talk about them in chambers, with counsel present, of
18 course.

19 THE COURT: Are you waiving Mr. Democker's
20 presence?

21 MR. SEARS: Yes, your Honor.

22 THE COURT: So just I will see counsel in
23 chambers, please, with the court reporter and clerk.

24 (Whereupon, the following was held in chambers.)

25 THE COURT: Okay. You are going to stand up?

1 That's okay.

2 Record reflects absence of defendant,
3 presence has been waived, presence of all counsel, court
4 reporter, clerk.

5 MR. SEARS: Judge, this is just a brief
6 matter, but it's a matter of continuing concern to us about
7 Mr. Democker's appearance in the way in which he is brought
8 over.

9 Apparently, unbeknownst to us but known
10 to Mr. Democker, is they changed the shaving and grooming
11 policy at the jail, again, and he's now only allowed to shave
12 twice a week, so he has a three- or four-day stubble here.
13 We are going to have proceedings that I think are going to be
14 covered by the media, and it's important to us and it's
15 important at trial.

16 The other problem is, as I interpreted
17 the Court's orders regarding Mr. Democker's appearance, one
18 of the things we were trying to avoid was the "perp walk"
19 from the van outside into the building and then through the
20 building. Today Mr. Democker was dressed in civilian clothes
21 at the jail. But when he came down, the van parked some
22 distance away, and he was taken in shackles out of the van
23 and walked under the stairs and then walked through the first
24 floor to the elevator and then up the elevator and down the
25 hall.

1 There is no -- other than the print
2 journalist who is here, there is no photography going on, but
3 I am concerned -- and I didn't want to do it because I am a
4 big fan of these particular detention officers in your court,
5 they have been extremely cooperative, and I didn't want to
6 say or do anything in open court that would imply that they
7 were somehow either ignoring your orders or doing something
8 that was contrary to what the Court had ordered.

9 THE COURT: Or necessarily tipping off
10 Miss Schultz and her outfit.

11 MR. SEARS: There is also that. But I didn't
12 think this was a matter -- it's just a matter of continuing
13 concern, and I know you see these same D.O.s on a regular
14 basis.

15 The other issues have to do with the use
16 of the locking leg brace and the stun belt. Mr. Democker has
17 gained a little weight from being in jail so long, and his
18 clothes fit a little more closely, and I can see that stun
19 belt. I had this exact issue years ago in this very
20 courtroom with Judge Anderson when Judge Kiger was my second
21 chair in the Aaron Holiday case, and Mr. Holiday, as the
22 Court will remember, escaped from jail pretrial and --

23 THE COURT: I didn't, but now that you refresh
24 my recollection --

25 MR. SEARS: -- with someone that you were

1 prosecuting. I don't remember which case it was, but at any
2 rate, we actually had an evidentiary hearing. It's a funny
3 story I'll tell off the record later, but -- about Judge
4 Kiger in a knee brace.

5 But Judge Anderson's ruling was that
6 there was sufficient security, that the locking brace was
7 visible to the jury, and the stun belt was both visible and a
8 significant impediment to a person's ability to concentrate
9 and think in court. That's a matter for another day.

10 But these matters about the "perp walk"
11 through the outside and the courthouse, particularly if he
12 comes over in orange and dresses out here, which is what
13 happens sometimes, this is a matter of media concern to me.

14 THE BAILIFF: Mr. Democker is free to go?

15 MR. SEARS: Could he be held for just a
16 minute?

17 THE COURT: Don't let him go then, Phil.

18 MR. SEARS: That is all, Judge. I just wanted
19 to bring these matters up about his grooming and appearance
20 and particularly the way in which he is being brought over to
21 the court, because when the cameras come back in, I will have
22 that concern. This might be a good time to remind the people
23 responsible for his custody what we need to do here.

24 THE COURT: This sheriff's office and this
25 sheriff and, as you say, these particular detention officers

1 are very good about their concerns, and I will seek some
2 additional cooperation from them to try to minimize the
3 issues that you are talking about.

4 But you recognize, as do I, there is no
5 tunnel into this building that we could use that goes from
6 the jail here and it's a fact that he is in custody. The
7 hovering detention officers are no surprise to the media and
8 anybody that has been paying attention to the case in the
9 media. Both supporters and detractors of Mr. Democker are
10 aware, based on what you read in the media, of his custody
11 status.

12 What we are primarily trying to do is
13 make sure that the jury that tries the case is able to be
14 fair and impartial and hopefully to not have any need for
15 change of venue, although that is an issue that you may
16 address, obviously, later. But I will see if I can have a
17 word with them. In terms of the photography in the
18 courtroom, I already entered some rulings with regard to
19 that. Nobody came today, which is a good thing, in my
20 opinion.

21 MR. SEARS: I know how we could make that
22 permanent. Just a suggestion, but I will save it for later.

23 MR. BUTNER: There is that First Amendment
24 thing.

25 THE COURT: Get the Amazon lawyers to come in

1 here.

2 MR. BUTNER: We are going to call them down on
3 you.

4 MR. SEARS: I am so glad you are on this case,
5 Joe.

6 THE COURT: So, yeah, I think I can have a
7 word with the people --

8 MR. SEARS: Thank you very much, Judge.

9 THE COURT: Hopefully, they can park a little
10 bit closer and try to minimize it, but it's not going to
11 eliminate it entirely, as Judge Hinson may be familiar with.

12 MR. SEARS: Sometimes they can back the van in
13 and take him up, and they can actually bring him up the
14 stairs.

15 THE COURT: And sometimes they do. I have a
16 good relationship with them. I don't want to kill my
17 relationship with them by -- in any individual case.

18 MR. SEARS: Would you tell them this was all
19 your idea?

20 THE COURT: They have always tried to
21 cooperate with the courts, and I am glad that we don't have
22 the situation that Mr. Hammond has down in his county.

23 MR. HAMMOND: It is my county, after all.

24 THE COURT: So I will see if I can put in a
25 word with them. They try to help.

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MR. SEARS: Thank you.

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MR. HAMMOND: Thank you, your Honor.

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(Whereupon, these proceedings were concluded.)

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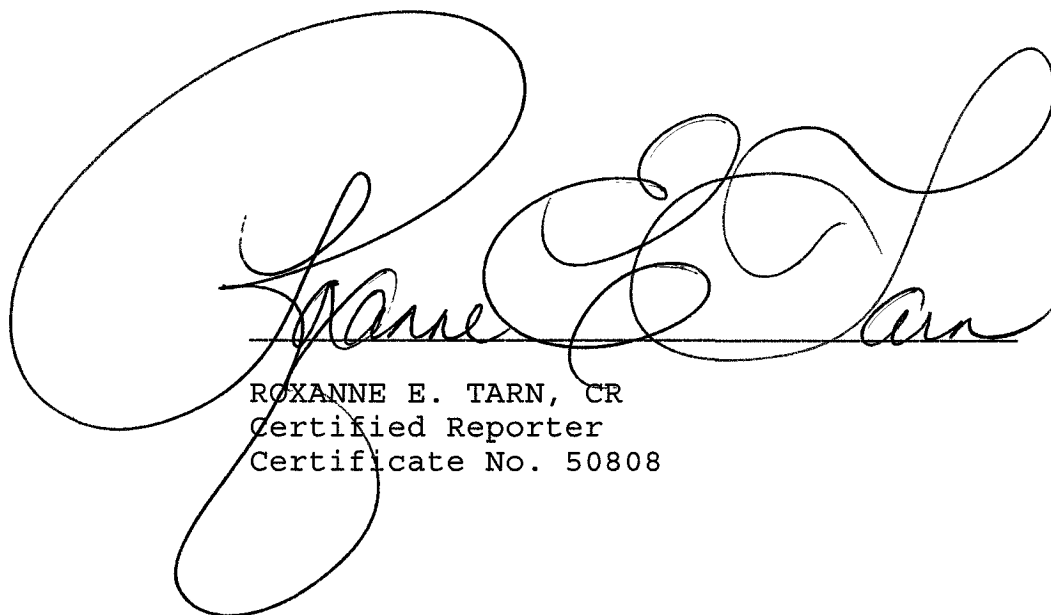
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 58 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 8th day of June, 2009.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808